ONG KIM HAI

v.

KUSAINI SURIP

FEDERAL COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 307/1983]
12 JULY 1984

TORT: *Negligence - Motor accident - Liability - Conflicting versions of accident - Reliance by trial Judge on silent evidence - Whether inferences drawn proper - Damages.*

CIVIL PROCEDURE: *Appeal - Acceptance by trial Judge of respondent's version of the accident - Whether could be questioned by appellate Court.*

The claim was for damages arising from an accident occurring at a junction between two motorcycles which were travelling in the same direction at the time. The appellant (plaintiff) and the respondent (defendant) gave conflicting versions of the accident.

The only issues to be decided were liability and quantum on general damages. Special damages and future loss of earnings had been agreed on. The trial Judge, preferring the version given by the respondent and relying on such silent evidence as the pleadings, a sketch plan, damages to the vehicles and police photographs, held the appellant wholly to blame for the accident and dismissed the action. The appellant appealed.

Held:

[1] The trial Judge had failed to draw proper inferences from the evidence available. The finding of a trial Judge on which of two conflicting versions of an accident is to be believed would normally be unassailable unless the appellate Court on receiving the evidence forms the opinion that the Judge was clearly wrong. (*Murugan v. Lew Chu Cheong* [1980] 2 MLJ 139; *Kerry v. Carter* [1969] 1 WLR 1372).

[2] The respondent could not be absolved completely from blame. Liability must be apportioned 75% against the appellant and 25% against the respondent. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable and prudent man, he might be hurt himself. (*Jones v. Livox Quarries Ltd.* [1952] 2 QB 608, 615; *Challoner v. Williams* [1975] 1 Lloyd's Law Reports 124).

[3] The case must be remitted to the trial Judge for assessment of general damages. It is very desirable for a trial Judge to assess the damages even if he comes to a finding that the action must fail. (*Yeoh Cheng Han v. Official Administrator* [1972] 2 MLJ 10).

Cases referred to:

Murugan v. Lew Chu Cheong [1980] 2 MLJ 139
Kerry v. Carter [1969] 1 WLR 1372
Jones v. Livox Quarries Ltd. [1952] 2 QB 608
Challoner v. Williams [1975] 1 Lloyd's Rep 124
Yeoh Cheng Han v. Official Administrator [1972] 2 MLJ 10

For the appellant - Krishnan; M/s. James Foong & Anad
For the respondent - Shu; M/s. V.P. Nathan & Partners

JUDGMENT

Hashim Yeop Sani FJ:

The claim before the trial Judge was for damages arising from an accident between two motorcycles occurring near a junction at the 18th milestone Kuala Lumpur/Rawang main road. The two motorcycles were travelling in the same direction, that is, from Kuala Lumpur towards Rawang, the respondent travelling behind the appellant.

As stated in the opening remarks of the judgment of the trial Judge, only two issues were to be decided by the Judge namely (1) liability and (2) quantum on general damages since the parties had agreed to special damages at RM10,918 and future loss of earnings assessed at RM59,800.

As regards liability the learned Judge held that the plaintiff there (appellant now) was wholly to blame for the accident and absolved the respondent from any blame whatsoever and accordingly dismissed the action with costs.

What transpired before the learned Judge was that after hearing the evidence of both the plaintiff and the defendant she found that they gave conflicting versions of the accident, whereupon she proceeded to seek assistance from the other silent evidence itemised in her judgment as the pleadings, sketch plan, damages to the vehicles and the police photographs to decide which of the two versions could be accepted as probably the true version.

It would appear that the trial Judge rejected the version of the appellant primarily because she found the damages to the appellant's motorcycle more consistent with the respondent's version of the accident and that the police photographs of the damages of the appellant's motorcycle did not substantiate his evidence that the respondent's motorcycle "knocked his motorcycle from the rear".

In our opinion apart from the fact that the use of the words "from the rear" or "from behind" appearing both in the evidence of the appellant (p. 15) as well as in the police report (p. 38) ("dari belakang") is only a manner of expression since both motorcycles were proceeding along the same direction with the respondent's motorcycle following behind, the learned Judge would seem to have overlooked the more pertinent and salient features of the evidence all of which incidentally appear at p. 20 of the appeal record. Firstly it was not disputed that the respondent knew that there was a junction just at the point of collision. In his evidence he said he could see 100 feet ahead of him and that when he first saw the plaintiff he was about 50 feet away from the junction. Secondly in his own evidence the respondent said that he had been following the appellant for half a mile consistently at a safe distance, that is 100 feet behind the appellant travelling at a speed of 35 m.p.h. But nearing the junction the respondent's motorcycle came closer to the appellant's motorcycle which meant that the appellant had slowed down. It was here that the respondent admitted to overtake the appellant when he was about 5 feet away from the junction. Thirdly immediately before overtaking the respondent gave two signals of his intention to overtake.

It was the respondent's case in the Court below that the appellant suddenly swerved to the right and the trial Judge found that the appellant had suddenly cut across the path of the respondent and that the respondent had not acted recklessly in attempting to overtake the appellant near the junction.

As can be seen the trial Judge preferred the version of the respondent purporting to rely on the silent evidence but failed however to draw the proper inferences from the evidence available. The finding of a trial Judge on which of the two conflicting versions of an accident is to be believed would normally be unassailable unless the appellate Court on reviewing the evidence forms the opinion that the Judge was clearly wrong. The approach to the exercise of the power available to an appellate Court is as stated by Lord Denning MR in *Kerry v. Carter* [1969] 1 WLR 1372, 1376 where he said:

> I think that the attitude of this Court was correctly stated in that case *(Brown v. Thompson* [1968] 1 WLR 1003 @ 1012, by Edmund Davies LJ when he quoted from the judgment of Sellers LJ in *Quintas v. National Smelting Board* [1961] 1 WLR 401, 409. This Court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the Judge has gone wrong in principle or is shown to have misapprehended the facts; but even if neither of these is shown, we will interfere if we are of opinion that the Judge was clearly wrong.

The learned Judge could have been under the impression that the appellant's motorcycle suddenly turning across the respondent's path was crucial as in the case of *Murugan v. Lew Chu Cheong* [1980] 2 MLJ 139. But the facts of this case are not on all fours with *Murugan.*

The learned Judge held appellant wholly to be blamed. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable and prudent man, he might be hurt himself. See *Jones v. Livox Quarries Ltd.* [1952] 2 QB 608, 615. We would also adopt the approach in *Challoner v. Williams* [1975] 1 Lloyd's Rep 124 where Megaw LJ at p. 126 said:

> I would not for one moment disagree with the view that one who is minded to turn his car across the road had got a duty, and a high duty, of care to traffic that may be using that part of the road and may be inconvenienced or put in danger by the manoeuvre of a car turning across. That applies both to traffic coming in the other direction, with which one would normally primarily be concerned, and also with the possibility that someone may be seeking to pass the turning car, travelling in the same direction.

In our view the same duty would also apply to the appellant as a motorcyclist in similar circumstances. But was the respondent wholly to be absolved from blame? He had been following the appellant for half a mile, travelling at about 35 m.p.h. He himself must have noticed that the appellant had slowed down and he also saw a junction 50 feet ahead. Would merely giving two signals before overtaking relieve him of any responsibility for the accident in the circumstances of the case? We do not think so.

We accordingly apportion the appellant's share of the blame as 75% and the respondent 25%.

As regards special damages and future loss of earning they had been agreed. As stated in the grounds of judgment of the learned Judge there was only the quantum on general damages before the trial Judge but no award was however made. We would like to repeat what Gill FJ (as he then was) said in this Court in *Yeoh Cheng Han v. Official Administrator* [1972] 2 MLJ at 10:

> Coming to the question of damages, it is a matter for regret that the learned Judge did not proceed to asses them on the assumption that the matter might go up to a higher Court. As has been said in some cases before, it is very desirable for a trial Judge to do so even if he comes to a finding that the action must fail.

We accordingly remit the case back to the trial Judge for assessment of general damages. Costs to the appellant to be taxed. Deposit to be refunded.

Also found at [1984] 2 CLJ 281